BRIEFER COMMUNICATIONS.

ECONOMIC AND UNECONOMIC ANTI-TRUST LEGISLATION.

Mr. W. W. Cook, in his little work on "Trusts" (p. 4), defines a trust as "a combination of many competing concerns under one management, which thereby reduces the cost, regulates the amount of production, and increases the price for which the article is sold." As Mr. Cook is severe in his denunciation of trusts, we may fairly infer that this definition is not unduly favorable. Now certainly it is not an evil to "reduce the cost" of producing an article. Nor, in view of the evils of "over-production," is it necessarily an evil to "regulate the amount of production." The evil lies, then, in "increasing the price for which the article is sold." Thus it appears that, if the objects in creating a trust are attained, *some* good will result, as well as some harm. Is there no way of securing this good while avoiding the harm? We think there is.

Prior to the year 1889, there had been little or no legislation directed against trusts. We do indeed find what is perhaps the earliest distinctively "anti-trust" provision (either constitutional or statutory) established in this country, namely, the following provision of the Georgia Constitution, adopted in 1877: "The General Assembly shall have no power to authorize any corporation . . . to make any contract or agreement whatever with any (other) corporation, which may have the effect or be intended to have the effect to defeat or lessen competition in their respective businesses, or to encourage monopoly: and all such contracts and agreements shall be illegal and void." This may, however, be regarded as a "sporadic" instance, and was directly aimed at railroad combinations, rather than at what are now known as trusts.

But the investigations carried on in 1888 by committees appointed by the United States House of Representatives, by the New York Senate, and by the Canadian House of Commons, resulted in a widely pervading view that stringent legislation on the subject was necessary; hence, in 1889, no fewer than *thirteen* States took action. In Kansas, Maine, Michigan, Missouri, Nebraska, North Carolina, Tennessee and Texas "anti-trust" statutes were enacted; in the new States of Idaho, Montana, North Dakota, Washington and Wyoming, constitutional provisions to the same effect were adopted. In 1890 *five* more States fell

into line by also enacting anti-trust statutes, viz: Iowa, Kentucky, Louisiana, Mississippi and South Dakota, besides the territory of Oklahoma. (In Kentucky, in 1891, and in Mississippi, in 1890, constitutional provisions to the same effect were adopted.) In 1890, too, a statute was enacted in North Dakota supplemental to the constitutional provision above referred to. In 1891 *three* more States, viz: Alabama, Illinois and Minnesota, enacted such statutes, besides the territory of New Mexico; and in 1893, *two* more States, viz: New York and Wisconsin. In 1893 too an anti-trust statute was enacted in California confined in its application to *live stock;* also one in Nebraska confined to *coal* and *lumber*. In some instances these statutes as originally enacted, have been amended, or re-enacted, to cure supposed or real defects: thus, in Missouri and Tennessee in 1891, in Louisiana in 1892, and in Illinois, Minnesota and South Dakota in 1893. Thus, we have at present* "anti-trust" provisions, either constitutional or statutory, in one-half the States of the Union. Besides these are the Act of Congress of July 2, 1890, directed to the same end, and the similar provision in the Tariff Act of August, 1894. All these statutes have in view *the prevention* of the existence of trusts.

But it is almost too obvious for argument, that production on a larger scale results in a smaller cost of production. Every one familiar with "shopping" in our large cities knows that the large retail stores, notwithstanding their costly establishments and service, are able to permanently undersell the smaller establishments. And it is well known that the creation of the combination known as the Standard Oil Trust has resulted in a large decrease in the price of oil. Professor Gunton has very clearly shown† how it came about that reduction in cost of production resulting from the establishment of that Trust, caused the price of refined oil to fall in eight years from over twenty-four cents to less than nine cents, not to speak of a great improvement in the quality of the oil.

In view of these facts, and many others that might be mentioned, no one will, we think, dispute that, *other things being equal*, the present tendency toward the concentration of capital is a beneficial one. In this view, the present course of legislation having in view the *prevention* of such concentration is indefensible as producing a public injury, in forcing the necessaries of life to be wastefully produced by a relatively large number of independent concerns at a greater cost than if produced by one comprehensive concern.

*This statement is possibly incomplete with reference to statutes that may have been enacted in 1894.

†"Social Economics," part 4, ch. vi.

But we waive discussion of the general question whether, after all, *any* legislation whatever having in view even the *regulation* of trusts is absolutely necessary. On the assumption that such legislation is a *practical* necessity, in view of existing popular prejudice, we now proceed.

The mode of action that seems to us the proper one, is not new; it is already in actual use to such an extent, indeed, that it is almost surprising that it has not been already recognized and adopted as the true one applicable to trusts. The rule is simply this: *Where there is a monopoly of the production of an article of necessary public use, let the price as charged by the monopolist be (where necessary) limited to a maximum fixed by law.* This is the rule at the basis of the Inter-State Commerce Law, and has been applied to the price of gas furnished in cities. Thus it is provided by statute in New York that, in any city of more than 800,000 inhabitants, the price of illuminating gas shall not exceed $1.25 a thousand.* So in the case of elevator charges (hereafter to be noticed).

If the rule works well in these cases, why should it not be given general application? The public would enjoy all the advantages of a decreased cost of production, without the disadvantages of a price established in the absence of competition. And, in accord with the maxim of "large sales and small profits," those controlling the monopoly would, even under the restriction of a properly established maximum price, have a sufficient inducement to produce. This appears from the circumstance that the gas companies in New York City and Brooklyn continue to do business, notwithstanding the limitation referred to. It is scarcely necessary to add that it will suffice to merely limit the price *as charged by the monopolist,* without, however, attempting to limit the price as charged by retailers, for instance.

Assuming such legislation to be abstractly desirable under proper conditions, it remains to consider some practical difficulties and the best methods of obviating them. Such difficulties arise from certain provisions in the Constitution of the United States (ignoring, for the present, any possible difficulties arising from provisions in State constitutions).

Would such legislation be opposed to the requirement of the Fourteenth Amendment: "Nor shall any State deprive any person of life, liberty or property, without due process of law?" The Supreme Court of the United States has† decided that the Fourteenth Amendment was not contravened by a State statute (of New York) fixing a maximum charge for receiving, weighing and discharging grain by means

* See Session Laws, 1892, ch. 566, sec. 70.

† In February, 1892.

of elevators and warehouses.* Judge Andrews, delivering the judgment of the Court of Appeals, said: "We rest the power of the legislature to control and regulate elevator charges, on the nature and extent of the business, *the existence of a virtual monopoly*, the benefit derived from the canal, creating the business and making it possible, the interest to trade and commerce, the relation of the business to the prosperity and welfare of the State, and the practice of the legislature in analogous cases." The same view was adopted by the Supreme Court. And in a previous decision† the same court declared in an opinion written by Chief Justice Waite: "It is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale."

Thus there seems reason to believe that the Fourteenth Amendment furnishes no obstacle to legislation of the kind proposed. But a more serious difficulty remains to be considered.

Supposing the State of New York, for instance, to enact a statute fixing a maximum price for a ton of coal, such statute may be assumed to be valid, so far as concerns any coal produced, or that might be produced, and sold within the State. But what effect would such a statute have as to coal produced in Pennsylvania, imported into New York, and sold there by the importer directly to the consumer? It would be absolutely null, as conflicting with the exclusive power of the Federal government to "regulate commerce among the several States." It was so held by the Supreme Court of the United States in the well-known "original package case," involving the effect of the Iowa prohibitory law.‡ Hence, in the absence of co-operating Federal legislation, a New York statute fixing a maximum price of coal would, so far as effectual, tend to defeat its own end by giving the monopolist coal producer a monopoly of the retail, as well as of the wholesale, traffic.

Yet there is a way out of the difficulty, a way similár to that devised for the purpose of giving effect to State prohibitory legislation. We refer to the "Wilson law," enacted by Congress in 1890, and providing that "intoxicating liquors shall, upon arrival in a State or territory, be subject to the operation of the police power of the State." This statute furnishes the needed suggestion. We should have legislation by Congress, to the effect that articles imported into a State (at least such articles as are necessaries of life) shall, *upon arrival in the*

* See Budd *vs.* New York, 143 *U. S.*, 517; which affirmed the decision of the New York Court of Appeals in 117 *N. Y.*, 1.

† Spring Valley Water Works *vs.* Schottler, 110 *U. S.*, 347, 354.

‡ Leisy *vs.* Hardin, 135 *U. S*, 100.

State, be subject to the power of the State to fix a maximum price therefor.

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TRUSTS: ABUSES AND REMEDIES.

The general effect of monopolies has been to depress the price of the material they use and raise the cost to the consumers. Upon the whole, this modern trust has not been conducted in a manner satisfactory to the people. Some legal restraint must be put upon it, or the character of its incorporators greatly improved.

The issuing of licenses upon payment of a certain sum is one way by which the monopoly might be controlled. The taxation of street car lines, gas and water works companies by municipalities, is now quite the fashion. There is a large school of thinkers who advocate this scheme of taxation as an easy means of bringing in revenue. The idea seems to be a popular one and a number of cities already derive a considerable portion of their income from this source.

Nevertheless, it is a species of indirect taxation and very unequal in its bearings upon individuals. The revenue from franchises and percentages on gross receipts, had better be left in the pockets of the people who patronize the monopolies. The highways belong to the people of the city and to tax themselves for using their own highways is an absurdity. It would seem more statesmanlike to require the monopoly to serve the people at the lowest price that would bear a given dividend. If the special taxes were removed from car lines many of them could afford to reduce the fare from five to three cents which would effect a saving to the wage-earner of ten to twenty dollars per annum.

Another and more just manner of dealing with the trust would be to give it free scope but fix a maximum price for the articles it controls.

Corporations have liberty as individuals to pursue their own ends, but not to injure the public. An exorbitant charge for a monopolized article is as much an injury as a depredation on one's property or an assault upon one's person. Neither a corporation nor an individual, at common law, has the right to inflict public injury. The purchase of an article from a trust at an excessive price does not necessarily constitute a valid contract, either from a moral or legal point of view. A strict interpretation of the common law would require all contracts to be based upon equivalent values. The law does not recognize contracts where there is no "value received," and nothing but expediency can prevent it from questioning implied contracts where one party in trading returns only a partial equivalent of the value received.